

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Denali Spectrum License Sub, LLC) WT Docket No. 09-64
)
Petition for Forbearance under 47 U.S.C. § 160(c))
from Application of the Unjust Enrichment)
Provisions of 47 C.F.R. § 1.2111(d)(2)(i))
)

ORDER

Adopted: May 25, 2010

Released: May 25, 2010

By the Commission:

I. INTRODUCTION

1. In this Order, we deny a request by Denali Spectrum License Sub, LLC (“Denali”) that we forbear from requiring it to repay benefits it received as a winning bidder in a Commission spectrum auction.¹ Denali acquired a license at auction with a 25 percent bidding credit, or discount, because it qualified under the Commission’s rules as eligible to receive small business benefits. It now asks that we not apply the unjust enrichment rule that would require it to repay this discount if it assigns the license to an entity that does not qualify for the same small business benefits.

2. The Commission’s bidding credit program is our primary method of promoting participation of small businesses and other designated entities in spectrum auctions. In accordance with Congress’s intent, this program is designed to ensure that each recipient of a bidding credit uses its license to directly provide facilities-based telecommunications services for the benefit of the public. Congress also specifically requires that we prevent entities from receiving an unfair windfall, or unjust enrichment, when they accept a bidding credit. We fulfill this mandate by requiring repayment of bidding credits under certain circumstances to ensure that entities ineligible for small business incentives cannot circumvent our rules by obtaining those benefits indirectly.

3. Because we find that Denali has not met the standard for forbearance, and because enforcement of the unjust enrichment rule serves the public interest, we deny Denali’s petition seeking forbearance from section 1.2111(d)(2) of our rules.²

II. BACKGROUND

4. In April 2007, Denali was awarded an Advanced Wireless Service (“AWS-1”) license for the 10 megahertz D Block in the Great Lakes region.³ Denali acquired the license in Auction 66 with a bidding credit of 25 percent because it qualified as a “very small business” under the rules applicable for

¹ Petition for Forbearance, filed by Denali Spectrum License Sub, LLC, on March 12, 2009 (“Petition”).

² 47 C.F.R. § 1.2111(d)(2).

³ See “Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66; Down Payments due October 4, 2006, FCC Forms 601 and 602 due October 4, 2006, Final Payments due October 19, 2006; Ten-Day Petition to Deny Period,” *Public Notice*, 21 FCC Rcd 10,521 (WTB 2006). Denali’s license is identified by call sign WQGV784.

AWS-1.⁴ According to Denali, it has built and launched a network using this license in the greater Chicago area and parts of Wisconsin in partnership with Cricket Communications, Inc.⁵

A. Small Business Bidding Credits and Unjust Enrichment Provisions

5. To provide opportunities for small businesses and other designated entities to participate in the provision of wireless services, the Commission, in accordance with Congressional objectives, has established a system of bidding credits to give small businesses a discount in Commission spectrum license auctions.⁶ In crafting auction rules for a given service, the Commission typically establishes one or more tiers of bidding credits to be offered to small businesses in accordance with size-based eligibility requirements.⁷ Congress also mandated that the Commission safeguard the award of the benefits to “prevent unjust enrichment as a result of the methods employed to issue licenses.”⁸ The Commission understood that this mandate required that it take steps to assure that a winning bidder claiming small business bidding credits should not be permitted to enjoy windfall profits from the resale of a license at the public’s expense, and should be required to make restitution of the benefits received.⁹

6. To this end, the Commission adopted section 1.2111(d)(2)(i), which requires an unjust enrichment payment when an entity that acquires a license with small business bidding credits loses its eligibility for such benefits or assigns the license to another entity that is not eligible for the same level of benefits.¹⁰ Prior to changes made in 2006, the unjust enrichment rule required repayment of the bidding

⁴ Denali submitted a winning bid in the amount of \$365,445,000 for this license. Denali’s 25 percent discount permitted it to pay a net amount of \$274,083,750, or approximately \$90 million less than the gross winning bid amount. 47 C.F.R. §§ 1.2110(f)(2)(iii), 27.1102(a)(2) and (b)(2).

⁵ Petition at 2. Although Denali has not filed any construction notification with the Commission, it indicates in the Petition that it has “secured debt and equity capital commitments sufficient to permit it to build out and operate a network covering approximately 20 percent of its geographic license area footprint....with a population of 11.6 million people.” *Id.* at 1-2.

⁶ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2391-92 ¶¶ 241-44 (1994) (“*Competitive Bidding Second Report and Order*”). Section 309(j) of the Act encourages the Commission to promote participation in the competitive bidding process by “designated entities,” including small businesses, rural telephone companies, and businesses owned by members of minority groups and women. See 47 U.S.C. §§ 309(j)(3)(B) and (4)(E). In light of constitutional constraints, the Commission has declined to adopt special provisions for minority-owned and women-owned businesses, but has found that minority- and women-owned businesses that qualify as small businesses may take advantage of the special provisions it has established for small businesses. See Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15,293, 15,319 ¶ 48 (2000).

⁷ See Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order*, WT Docket No. 02-353, 18 FCC Rcd 25,162, 25,220 ¶ 148 (2003), *affirmed by Order on Reconsideration*, 20 FCC Rcd 14,058, 14,073 ¶ 28 (2005); 47 C.F.R. § 27.1102 (small business bidding credits for AWS-1).

⁸ 47 U.S.C. §§ 309(j)(3)(C) and (4)(E).

⁹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385 ¶¶ 211-12.

¹⁰ 47 C.F.R. § 1.2111(d)(2)(i). See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385-86 ¶¶ 211-15, 2394-95 ¶¶ 258-65. In addition, the designated entity must repay the full amount if the loss of eligibility occurs anytime in the license term prior to the entity meeting its construction requirements. See 47 C.F.R. § 1.2111(d)(2)(i).

credit on a pro rated basis over the first five years of the license term, with no unjust enrichment payment owed after the fifth year.¹¹

7. In order to safeguard the award of such benefits to only bona fide small businesses, the Commission revised its unjust enrichment rule in 2006, deciding to extend the unjust enrichment repayment schedule to cover a period of ten years.¹² Under the modified rules, the unjust enrichment payment owed in the first five years of the license term is 100 percent of the bidding credit received. After five years, if the licensee has fully met its construction requirements, the reimbursement schedule is pro-rated over the next five years of the license term.¹³ By extending the unjust enrichment period from five to ten years, the Commission sought to ensure that “every recipient of [small business bidding credit] benefits is an entity that uses its licenses to directly provide facilities-based telecommunications services for the benefit of the public.”¹⁴

B. Denali Petition

8. On March 12, 2009, Denali filed a petition seeking forbearance from the current unjust enrichment provisions and requesting the application of the prior rules if, and when, it elects to assign part of its license to an entity that does not qualify for the benefit Denali received. Such an event would normally trigger an unjust enrichment payment according to the schedule set forth in section 1.2111(d)(2)(i).¹⁵

¹¹ Specifically, under the unjust enrichment rule in effect prior to changes made in 2006, a loss of eligibility in the first two years would result in a 100 percent forfeiture of the bidding credits; in year three, 75 percent; in year four, 50 percent; and in year five, 25 percent. 47 C.F.R. § 1.2111(d) (1998). The prior rules’ schedule remains applicable to licenses granted before April 25, 2006. See 47 C.F.R. § 1.2111(d)(2)(ii).

¹² See Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753, 4767 ¶ 37 (2006) (“*Designated Entity Second Report and Order*”). At that time, the Commission observed that “[t]he challenge ... in carrying out Congress’s plan has always been to find a reasonable balance between the competing goals of, first, providing designated entities with reasonable flexibility in being able to obtain needed financing from investors and, second, ensuring that the rules effectively prevent entities ineligible for designated entity benefits from circumventing the intent of the rules by obtaining those benefits indirectly, through their investments in qualified businesses.” *Id.* at 4756 ¶ 8.

¹³ Specifically, for licenses granted after April 25, 2006, in the first five years of the license term, the licensee must reimburse 100 percent of the bidding credit upon losing eligibility. 47 C.F.R. § 1.2111(d)(2)(i). After the licensee has met its full construction requirements, a loss of eligibility in the sixth or seventh year of the license term would result in 75 percent forfeiture; in eighth and ninth year, 50 percent forfeiture; and in the tenth year, 25 percent forfeiture. *Id.* The rules and Commission orders do not impose unjust enrichment liability beyond ten years, even if a license term is longer than ten years, as is the case with AWS-1 licenses granted on or before December 31, 2009.

¹⁴ *Designated Entity Second Report and Order*, 21 FCC Rcd at 4755 ¶ 3.

¹⁵ Petition at 6, 15. The Petition provides, as an example, figures for a hypothetical partitioning of a geographic area that includes 20 percent of the population of Denali’s license area to a non-eligible entity. *Id.* at 11. Denali claims that it would be required under the current unjust enrichment rules to repay \$21.9 million for the partitioned area, and, under the prior rules, would be required to repay only \$5.5 million, which is \$16.4 million less than would be owed under the existing rules. *Id.* Under the terms of Denali’s amended and restated limited liability company agreement, Denali’s controlling interest holder may offer to sell its entire membership interest in Denali to a wholly-owned subsidiary of Leap Wireless International, Inc. (which currently holds an 82.5 percent non-controlling equity interest in Denali) beginning in April 2012 and each year thereafter for a purchase price equal to the controlling interest holder’s equity contributions to Denali, plus a specified return. See FCC Form 601 license application of Denali Spectrum License, LLC, Exhibit D, FCC File No. 0002774595 (as amended Apr. 18, 2007) (summary of Denali’s amended and restated limited liability company agreement). Any such transaction would be subject to the (continued....)

9. According to Denali, if the Commission forbears from enforcing section 1.2111(d)(2), Denali would direct the money that would be used to satisfy its unjust enrichment payment to instead fund continued network construction.¹⁶ Denali asserts that it meets each of the three criteria of the forbearance standard of Section 10(a) of the Act.¹⁷

C. TCA Comment and SBA Advocacy Ex Parte

10. On May 19, 2009, the Wireless Telecommunications Bureau (“Bureau”) placed Denali’s petition on public notice.¹⁸ No comments were submitted by the initial comment deadline, but one reply comment was timely filed by TCA, Inc. (“TCA”).¹⁹ TCA, which describes itself as a management consulting firm representing small, rural companies that have acquired licenses through bidding credits, supports the grant of Denali’s request for forbearance and argues that forbearance should be extended to all designated entities. TCA argues that small businesses lack build-out financing, that the Commission has other tools to prevent unjust enrichment, and that the current rules impede the creation of new businesses.²⁰

11. Subsequently, on August 25, 2009, the Small Business Administration’s Office of Advocacy (“SBA Advocacy”) met with the Commission’s Office of Communications Business Opportunities to discuss comments it had previously filed regarding the designated entity rules and to advocate granting Denali’s petition.²¹ The SBA Advocacy Ex Parte Letter argues that the Commission’s 2006 changes to the designated entity rules, including the extension of the unjust enrichment period from five to ten years, are inhibiting the participation of small entities and minority businesses in recent spectrum auctions.²² In its Ex Parte Letter, SBA Advocacy acknowledges that the 2006 changes were meant to prevent fraud and other abuses, but argues “the administrative record fails to support [that] justification.”²³ The SBA Advocacy Ex Parte Letter therefore recommends amending the designated entity rules, and acting quickly to grant Denali’s petition.²⁴

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unjust enrichment rule until April 2017, which is the ten-year anniversary of the grant of Denali’s license. 47 C.F.R. § 1.2111(d).

¹⁶ Petition at 4-5. Denali adds forbearance would also be “consistent with the federal government’s larger efforts to stimulate the economy.” *Id.* at 5.

¹⁷ 47 U.S.C. § 160(a).

¹⁸ “Wireless Telecommunications Bureau Seeks Comment on Petition of Denali Spectrum License Sub, LLC for Forbearance from Unjust Enrichment Provisions of 47 C.F.R. § 1.2111(d)(2)(i),” WT Docket No. 09-64, *Public Notice*, 24 FCC Rcd 5720 (WTB 2009).

¹⁹ Comments filed by TCA, Inc., dated July 6, 2009 (“TCA Comments”).

²⁰ TCA Comments at 2-4.

²¹ Letter from Cheryl Johns, Assistant Chief Counsel for Telecommunications, Office of Advocacy, Small Business Administration to Marlene H. Dortch, Secretary, FCC, dated August 25, 2009 (“SBA Advocacy Ex Parte Letter”).

²² SBA Advocacy Ex Parte Letter at 2. The SBA Advocacy Ex Parte Letter notes that the SBA Office of Advocacy is an independent office within the SBA and that, therefore, its views “do not necessarily reflect the views of the SBA or the Administration.” *Id.* at 1-2.

²³ *Id.* at 2.

²⁴ *Id.*

III. DISCUSSION

A. Forbearance Standard

12. Section 10(a) of the Act requires the Commission to forbear from applying any regulation or provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that the following three criteria are satisfied:

- (1) Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) Enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) Forbearance from applying such provision or regulation is consistent with the public interest.²⁵

Section 10(b) of the Act specifies that, in making the public interest determination under the third prong of the three-part forbearance standard, “the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”²⁶ Section 10(b) further specifies that, “[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”²⁷

B. Denali’s Request for Forbearance from Unjust Enrichment Regulations

13. We find that Denali has not met all three prongs of the standard as required for forbearance.²⁸ While Denali’s petition satisfies the first prong of the standard, we conclude that it does not satisfy either the second or third prong.

14. With respect to the first prong, Denali states that section 1.2111(d)’s unjust enrichment requirement “has no bearing on Denali’s charges, practices, classifications, or regulations and whether they are just and reasonable and are not unjustly or unreasonably discriminatory.”²⁹ We agree because, as we explain further below, the unjust enrichment provisions are intended to help ensure that only *bona fide* small businesses receive the benefit of these bidding discounts and thereby protect the designated entity program from potential abuse by larger entities. Accordingly, we find that Denali’s arguments satisfy the first prong of the forbearance standard, Section 10(a)(1) of the Act, because enforcement of the unjust enrichment rule “is not necessary to ensure that [Denali’s] charges, practices, classifications, and regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory.”³⁰ Denali’s

²⁵ 47 U.S.C. § 160(a).

²⁶ 47 U.S.C. § 160(b).

²⁷ *Id.*

²⁸ 47 U.S.C. § 160(a).

²⁹ Petition at 8.

³⁰ 47 U.S.C. § 160(a)(1). For purposes of a forbearance analysis, a provision or regulation is considered “necessary” if there is a strong connection between the requirement and regulatory goal. See *CTIA v. FCC*, 330 F.3d 502, 512 (continued....)

petition, however, does not meet the other two prongs of the forbearance standard for the reasons discussed below.

1. Consumer Protection

15. A petition under Section 10 must demonstrate that enforcement of such regulation or provision is not necessary to protect consumers.³¹ Denali argues that consumers would actually benefit from forbearance in two ways. First, Denali maintains that its pay-in-advance, unlimited service plan provides an alternative to the plans of major carriers, particularly for low-income and minority individuals.³² Second, Denali contends that the additional capital it would retain if we forbear from applying the current unjust enrichment rules would allow it to expand its coverage to an estimated 550,000 additional people, creating a new competitor in whichever market Denali decides to expand.³³

16. Even if we accept Denali's unverifiable statements about how the amount of any unjust enrichment payment would otherwise be used by Denali in its own business, such assertions are immaterial here since the unjust enrichment provisions are intended to protect consumers generally. As stated above, the unjust enrichment rules are critical components of the program of small business benefits, which help to ensure that: (1) small businesses have opportunities to gain access to spectrum; (2) only qualified small businesses benefit from the credits; (3) those small businesses provide facilities-based service to the public; and (4) our auctions and licensing processes are fair and efficient.³⁴

17. Consumers of wireless services throughout the United States are best served by promoting all of these objectives. Small business licensees often provide niche services and innovation in the wireless market, and ensuring that only eligible entities receive the Commission's designated entity benefits furthers the program's continued success as well as the fairness and efficiency of our competitive bidding and licensing processes. Consumers benefit from rules intended to increase the probability that designated entities develop into competitive facilities-based service providers and not into entities that simply seek a "windfall profit," that is, a profit from the assignment of a license acquired by a small business at a discount.³⁵ Denali suggests that consumers in a particular market may benefit from the increased competition that Denali might provide using the funds it would otherwise be required to repay under the unjust enrichment rule. We must, however, weigh that speculative gain against the benefits all consumers receive by maintaining the integrity of the designated entity program through the consistent application of the unjust enrichment rule. Thus, application of the rule will benefit consumers more broadly than forbearance, even if it does not provide Denali's business with a specific advantage or provide Denali's claimed additional benefits to certain of its customers. We therefore conclude that Denali has failed to demonstrate that enforcement of the unjust enrichment provisions is not necessary to protect consumers.

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(D.C. Cir. 2003). See also *Virgin Mobile USA, L.P. Petition for Forbearance from 47 U.S.C. § 214(e)(1)(A)*, *et al.*, CC Docket No. 96-45, *Order*, 24 FCC Rcd 3381, 3388 ¶ 17 (2009).

³¹ See 47 U.S.C. § 160(a)(2).

³² Petition at 10.

³³ Petition at 11. Denali cites *Des Moines* as its example. *Id.* at 13.

³⁴ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2389 ¶ 230; *Designated Entity Second Report and Order*, 21 FCC Rcd at 4766 ¶ 36.

³⁵ See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385 ¶ 212, 2394 ¶ 259.

2. Public Interest

18. Under the third prong of Section 10 of the Act, a petitioner must demonstrate that forbearance is consistent with the public interest.³⁶ We find that Denali fails to demonstrate that forbearance from enforcing the current unjust enrichment provisions would serve the public interest.

19. Denali maintains that forbearance is consistent with the public interest because it will give Denali access to capital for extending the reach of its network, which in turn, will allow it to offer its “innovative pay-in-advance wireless service” to a larger group of consumers, enhance its ability to compete, help create new jobs, and provide advanced infrastructure and wireless services that will support economic growth.³⁷ Denali adds that the “historic economic crisis now facing the nation” further supports forbearance from enforcing the unjust enrichment provisions, particularly when the federal government is spending billions of dollars to help revive the economy.³⁸ Finally, Denali asserts that facilitating its access to capital by forbearance is in the public interest because it will promote the Commission’s goal of diversifying ownership of telecommunications companies.³⁹

20. We are not persuaded by Denali’s arguments because they do not account for the public interest in enforcement of the designated entity rules generally and the unjust enrichment provisions specifically. The Commission’s designated entity program is intended to fulfill Congress’s mandate that we provide opportunities for such entities to participate in the provision of spectrum-based services while preventing unjust enrichment. The program also furthers other statutory objectives, which include “promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses” and other designated entities.⁴⁰ Unjust enrichment provisions were designed to work hand-in-hand with the Commission’s award of small business bidding credits.⁴¹ Created as a “financial disincentive[] to prevent sellers from obtaining any windfall profit from premature transfer of a license,”⁴² unjust enrichment provisions were part of the original safeguards for the auction process, which help ensure that only those that are eligible receive designated entity benefits.⁴³ Our unjust enrichment provisions allow a designated entity to sell its license, even prior to meeting construction requirements, but the designated entity must reimburse the government for the benefit it received if the license is assigned to an entity that is not eligible for the same small business benefits.⁴⁴

21. In Denali’s case, for example, it submitted a gross winning bid in excess of \$365 million for its AWS-1 license. Its 25 percent discount allowed it to pay a net amount of approximately \$90 million less than its total gross winning bid. Allowing a designated entity, after receiving such a significant discount, to then sell the license to a non-eligible entity at market value without repaying the

³⁶ See 47 U.S.C. § 160(a)(3).

³⁷ Petition at 12-13.

³⁸ *Id.* at 4-5. Denali adds that “[a]pplication of Section 1.2111(d)(2)(i) in this context is contrary to these national goals.” *Id.*

³⁹ *Id.* at 14-15.

⁴⁰ 47 U.S.C. § 309(j)(3)(B) and (4)(D). *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2388 ¶ 227.

⁴¹ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2385 ¶ 211, 2394 ¶¶ 258-59.

⁴² *Id.* at 2385 ¶ 211.

⁴³ *Id.* at 2384-85 ¶ 210.

⁴⁴ *Id.* at 2395 ¶ 264.

credit would create a windfall profit.⁴⁵ While Denali does not offer specific details of any proposed partial assignment, it does provide, as an example, figures for a hypothetical partitioning to a non-eligible entity of a geographic area that includes 20 percent of the population of Denali's license area.⁴⁶ According to Denali, it would be required under the current unjust enrichment rules to repay \$21.9 million for the area that it contemplates partitioning and assigning to a larger entity.⁴⁷

22. Granting forbearance under the circumstances proposed by Denali would provide a significant private benefit to Denali without serving the Commission's public interest objective of assuring that bidding credits provide opportunities for small businesses and others to participate in the provision of spectrum-based services and become facilities-based service providers.⁴⁸ Forbearance in Denali's proposed example would lead to windfall profits, which might be shared by Denali with a non-eligible entity by way of a reduced sale price, thereby undercutting the unjust enrichment rule's aim of "ensur[ing] that designated entity benefits go to their only intended beneficiaries."⁴⁹ In other words, while Denali argues that the public will benefit if it is allowed to retain funds that would otherwise have to be repaid as unjust enrichment, we must consider the need to guard the designated entity program from possible abuse, thereby preserving its effectiveness as a means of ensuring access to spectrum for small businesses and increasing the probability that those small businesses develop into facilities-based service providers. To this end, application of, rather than forbearance from, the unjust enrichment rule serves the public interest by helping to ensure that only *bona fide* small businesses receive the benefit of these bidding discounts and the designated entity program is protected from potential abuse by larger entities. Moreover, the application of the unjust enrichment rule is just and fair to the other winners of licenses in Auction 66 and other auctions that have already complied with the rule,⁵⁰ as well as to other small business entities that have participated in the Commission's auction process with the expectation that the competitive bidding rules would be enforced uniformly.

⁴⁵ Additionally, Congress expressed concern for "bids that fall short of the true market value of the license," stating that "[t]o the extent that the Commission is attempting to achieve a justifiable social policy goal – such as the reservation of appropriate licenses for small business applicants – licensees should not be permitted to frustrate the goal by selling their license in the aftermarket. In these instances, anti-trafficking restrictions are necessary and appropriate." *Id.* at 2385 n.158, citing H.R. Rep. No. 103-111 at 257.

⁴⁶ Petition at 11.

⁴⁷ *Id.* Denali proposes, as an alternative, to pay the unjust enrichment amount that would have been due under the former rules. *Id.* at 15. Under the prior rules, Denali's unjust enrichment payment for its contemplated transaction would, by its own accounting, amount to only \$5.5 million, or approximately \$16.4 million less than would be owed under the existing rules. *Id.* at 11.

⁴⁸ See 47 U.S.C. § 309(j)(3)(B); see also *Designated Entity Second Report and Order*, 21 FCC Rcd at 4755 ¶ 3, 4766 ¶ 36.

⁴⁹ Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd 6703, 6716 ¶ 36 ("*Designated Entity Order on Reconsideration of the Second Report and Order*"). "The Commission strengthened its rules to ensure that those that receive such benefits were properly motivated to build out their spectrum and provide services for the benefit of the public by closing off the opportunity to sell licenses awarded with bidding credits for huge profits without ever having to provide actual facilities based services." *Id.* at 6717-18 ¶ 39.

⁵⁰ See, e.g., Assignment Application filed by Daredevil Communications, LLC (assignor) and Cricket Licensee (Reauction), LLC (assignee), filed Feb. 13, 2009, consented to on Apr. 28, 2009, and consummation notice filed on Jun. 19, 2009, File No. 0003728234; Assignment Application filed by Cavalier Wireless, LLC (assignor) and MetroPCS Georgia, LLC (assignee), filed Dec. 23, 2008, consented to on Jan. 23, 2009, and consummation notice filed on Apr. 8, 2009, File No. 0003665443.

23. We are not persuaded that the current state of the capital markets and Denali's need for additional capital should cause us to conclude that it would be in the public interest to forbear from enforcing the unjust enrichment provisions adopted in 2006 and apply the former unjust enrichment rules to its contemplated transaction. As explained above, when the Commission amended the unjust enrichment provisions in 2006, it extended the unjust enrichment period from five to ten years to "increase the probability that the designated entity will develop to be a competitive facilities-based service provider"⁵¹ and to "ensure that designated entity benefits go to their only intended beneficiaries."⁵² The Commission revised its rules to encourage small businesses to build out their spectrum and provide services for the benefit of the public by "closing off the opportunity to sell licenses awarded with bidding credits for huge profits without ever having to provide actual facilities based services."⁵³ Denali has not shown that the public interest in enforcing the unjust enrichment safeguard is outweighed by its current capital needs. We note that SBA Advocacy's letter contains no evidence to support its assertions that the 2006 rule amendments are inhibiting the participation of small entities and minority businesses in recent spectrum auctions.⁵⁴ SBA Advocacy also asserts without any specifics that the Commission's concern about fraud and unjust enrichment was not supported by the administrative record underlying the 2006 amendments.⁵⁵ Neither of these conclusory assertions convince us that forbearance from these rules would be in the public interest.

24. We also find unpersuasive Denali's reliance on general economic conditions as a justification for forbearance. As the Commission has previously observed:

The Commission has not been charged with providing entities with a path to financial success, but rather with an obligation to facilitate opportunities for small businesses to provide spectrum based services to the public. . . . It is important to remember that designated entities are provided with bidding credits in order to enable them to obtain spectrum and then provide facilities-based service to the public. To the extent that they do not do so, but instead sell their licenses to others in the marketplace at market prices, we believe that it is reasonable that they no longer be allowed to enjoy the benefit of obtaining spectrum at below-market prices.⁵⁶

⁵¹ *Designated Entity Second Report and Order*, 21 FCC Rcd at 4766 ¶ 36.

⁵² *Designated Entity Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd at 6716 ¶ 36. As the Commission indicated in the *Designated Entity Second Report and Order*, it imposed these new, stricter provisions "because the implementation of such a policy is consistent with the policies underlying the Commission's designated entity and unjust enrichment requirements." *Designated Entity Second Report and Order*, 21 FCC Rcd at 4767 ¶ 39. The Commission added "[b]y expanding the unjust enrichment period and requiring full payment of the bidding credit until a license has been constructed, we are fulfilling Congress's mandate that designated entities are given the opportunity to participate in the provision of spectrum-based services, while ensuring that entities that are not eligible for designated entity benefits cannot benefit from the designated entity program." *Id.*, citing 47 U.S.C. § 309(j)(3)(c) and (4)(E). The Commission required that it must be reimbursed for the entire bidding credit amount owed, plus interest, if a designated entity loses its eligibility for a bidding credit for any reason prior to the filing of the notification informing the Commission that the construction requirements applicable at the end of the license term have been met. *Id.* at 4767 ¶ 38.

⁵³ *Designated Entity Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd at 6717-18 ¶ 39. While we acknowledge Denali's assertions that it has built out in portions of its licensed service area in Chicago and certain cities in Wisconsin, Denali's contemplated partial assignment would logically involve the divestiture of areas, including rural areas in the Great Lakes REAG, that Denali has not built out.

⁵⁴ SBA Advocacy Ex Parte Letter at 2

⁵⁵ *Id.*

⁵⁶ *Designated Entity Order on Reconsideration of the Second Report and Order*, 21 FCC Rcd at 6718 ¶ 40.

25. In addition, it is not clear that granting forbearance to Denali will promote competition among providers of telecommunications services. Denali suggests that it would devote the monies it would otherwise pay under the unjust enrichment rule to further develop its markets, but provides no definitive plan for doing so.⁵⁷ In any case, even if granting forbearance and allowing Denali to keep more of any proceeds from a hypothetical partitioning transaction might help Denali to compete, consistent application of the unjust enrichment rule will protect the benefits that provide opportunities to designated entities generally and thereby promote the public interest in economic opportunity, diverse ownership, and competition.⁵⁸

26. Based on the above, we find that Denali's petition fails to demonstrate that forbearance from enforcing the current unjust enrichment provisions is in the public interest.

C. TCA's Proposals

27. As noted above, TCA, in its comments supporting Denali's petition, advocates, among other issues, extending forbearance to all designated entities because, as it argues, small businesses lack build-out financing, the Commission has other tools to prevent unjust enrichment, and the current rules impede the creation of new businesses.⁵⁹ TCA's proposal, however, goes beyond the scope of Denali's petition and the public notice seeking comment on Denali's petition. The Commission's practice in forbearance proceedings has been to exclude from consideration subjects raised in comments that go beyond the scope of the matters upon which it has sought comment.⁶⁰ Therefore, we reject TCA's proposal.⁶¹

⁵⁷ In addition, Denali's argument that forbearance would be consistent with general Federal stimulus funds is likewise unconvincing because it is not obvious that Denali's plans align with the goals of the Broadband Technologies Opportunities Program authorized by Congress.

⁵⁸ We note that the Bureau has previously denied requests to waive our unjust enrichment rules. See *Winstar LMDS, LLC (Chapter 7 Debtor) Request for Waiver of 1.2111(d) and 101.1107(e) of the Commission's Rules Regarding Unjust Enrichment Payment for Fifteen LMDS Licenses Purchased in Auction No. 17*, Order, 17 FCC Rcd 7084 (WTB 2002); *Telecorp PCS, Tritel, Inc., et al., Memorandum Opinion and Order*, 16 FCC Rcd 3716, 3733-37 ¶¶ 42-49 (WTB 2000).

⁵⁹ TCA Comments at 2-4. TCA points to the lack of opposition to Denali's request as a further reason to extend forbearance to all designated entities. *Id.* at 5.

⁶⁰ See, e.g., *Comment Dates Set on AT&T Compliance Plan for Forbearance Relief from Cost Assignment Rules*, Public Notice, 23 FCC Rcd 11,560 (WCB 2008). In any case, as TCA itself states, it is not a telecommunications carrier. TCA Comments at 1. Therefore, it may not be eligible under Section 10(c) of the Act to file a forbearance petition. Thus, we decline to consider forbearance requested in comments filed by a party that is ineligible to file a forbearance petition of its own. Even if we were to consider the merits, however, we would reject TCA's proposal for the same reasons we deny Denali's forbearance. Forbearing from applying the unjust enrichment provisions for all designated entities would undermine the goals of the designated entity program. Therefore, as we found with Denali, application of, rather than forbearance from, the unjust enrichment rule is necessary to ensure that the Commission's award of designated entity benefits is just and reasonable, protects the consumers in general, and is in the public interest.

⁶¹ TCA also suggests that the Commission should also "review its other rules and procedures to ascertain if they, too, are impeding the wide dissemination of wireless licenses, a position that would be in conflict with the Congressional mandate," specifically citing the length of time that the Commission takes in reviewing transfer and assignment applications. TCA Comments at 4-5. This request for a broad review also exceeds the scope of the issues raised in the Denali's petition and we likewise dismiss this request.

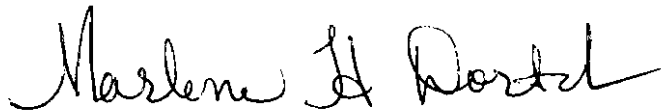
IV. CONCLUSION

28. We conclude that Denali's request does not meet the statutory criteria for forbearance. Therefore, we deny Denali's petition for forbearance. We also dismiss TCA's proposal to forbear from enforcing the unjust enrichment provisions with respect to all designated entities on both procedural grounds and for the same public interest reasons that we deny Denali's petition.

V. ORDERING CLAUSES

29. Accordingly, IT IS ORDERED that the Petition for Forbearance under 47 U.S.C. § 160 filed by Denali Spectrum License Sub, LLC, on March 12, 2009, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary